

HIPAA - Privacy - Marketing

TRICARE Management Activity, Electronic Business Policy & Standards

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA)

General Requirement

In general, marketing and marketing communications are areas under the HIPAA Privacy Rule that require the individual's authorization. Because of the natural overlap between treatment, payment, and health care operations (TPO) and marketing, some activities may meet the criteria under both definitions. Normally, any activity that meets the Rule's definition of marketing, unless it is one of the three exemptions explained below, should be considered as marketing activities, regardless of the overlap with TPO activities. Finally, activities such as disease management, health promotion, preventative care, and wellness programs must be examined by the individual covered entities to determine whether the activities involved constitute marketing under the Rule's definition.

Definition of Marketing

Under the HIPAA Privacy Rule, marketing is defined as "a communication about a product or service, a purpose of which is to encourage recipients of the communication to purchase or use the product or service." Because this definition is somewhat vague, the Privacy Rule further defines what marketing does not include.

Communications That Are Not Marketing

In effect, in recommending treatments or describing available services, health care providers and health plans are advising us to purchase goods and services. To prevent any interference with essential treatment or similar health-related communications with a patient, the rule identifies the following activities as not subject to the marketing provision, even if the activity otherwise meets the definition of marketing.

Thus, a covered entity is not "marketing" when it:

- Describes the participating providers or plans in a network. For example, a health plan is not marketing when it tells its enrollees about which doctors and hospitals are preferred providers, which are included in its network, or which providers offer a particular service. Similarly, a health insurer notifying enrollees of a new pharmacy that has begun to accept its drug coverage is not engaging in marketing.
- Describes the services offered by a provider or the benefits covered by a health plan. For example, informing a plan enrollee about drug formulary coverage is not marketing.

Furthermore, it is not marketing for a covered entity to use an individual's protected health information (PHI) to tailor a health-related communication to that individual, when the communication is:

- Part of a provider's treatment of the patient and for the purpose of furthering that treatment. For example, recommendations of specific brand-name or over-the-counter pharmaceuticals or referrals of patients to other providers are not marketing.

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Highlights

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- ♦ Marketing to Business Associates

HIPAA PROGRAM OFFICE

Skyline 5, Suite 810
5111 Leesburg Pike
Falls Church, VA
22041-3206
Ph: 703-681-5611
Fax: 703-681-8845

TMA HIPAA Website:
www.tricare.osd.mil/hipaa

E-Mail:
hipaamail@tma.osd.mil





- ♦ Made in the course of managing the individual's treatment or recommending alternative treatment. For example, reminder notices for appointments, annual exams, or prescription refills are not marketing. Similarly, informing an individual who is a smoker about an effective smoking-cessation program is not marketing, even if that program is offered by someone other than the provider or plan making the recommendation.

Exceptions to the Marketing Communications Requirement

Under certain circumstances, covered entities do not need an individual's authorization to use or disclosure PHI for marketing purposes. These exceptions are as follows:

- ♦ Face-to-face communications with the individual. For example, sample products may be provided to a patient during an office visit
- ♦ Activities that involve products or services of nominal value. For example, a provider can distribute pens or toothbrushes with the name of the covered entity or a health care product manufacturer on it

Marketing to Business Associates

Under the HIPAA PrivacyRule, disclosure of PHI by a covered entity to a business associate is limited to disclosure to business associates that undertake marketing activities on behalf of the covered entity; PHI may not be disclosed to a business associate for the business associate's own purposes. All other disclosures are prohibited under the Rule. Covered entities may not sell or give away lists of patients or enrollees without obtaining authorizations from each individual on the list. Finally, as with any business associate disclosure, the covered entity must obtain a business associate agreement to disclose PHI to the business associate.